

**Before the
Federal Communications Commission
Washington, DC 20554**

April 30, 2007

In the Matter of)	
Skype Communications S.A.R.L.)	
Petition to Confirm a Consumer's Right to Use)	RM-11361
Internet Communications Software and Attach)	
Devices to Wireless Networks)	

FreedomWorks is an 830,000-member grassroots organization that promotes market-based solutions to public policy issues. Established in July 2004 through a merger of Citizens for a Sound Economy and Empower America, FreedomWorks has consistently pursued policies that foster free-enterprise and competition. FreedomWorks has been actively involved in a number of regulatory issues and has been particularly interested in technological advances and changes in the marketplace that bolster competition and consumer choice. In such instances it is critical that the regulatory framework adapt to the realities of the marketplace so that consumers are not unnecessarily restricted in their choices and the degree of competition in the marketplace is maximized.

We submit these comments in response the Petition to Confirm Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks. Briefly, we urge the commission to exercise forbearance in its regulation of wireless networks. Competition is brisk, prices are declining, and quality is significantly improving—hardly the signs of a non-competitive market. The Petition relies on the *Carterfone* decision to suggest new regulatory requirements mandating more open networks. We believe it is incorrect to rely on this decision because it was delivered to address concerns over market power in a heavily regulated, government-sanctioned monopoly. By contrast, wireless markets are competitive, and market pressures have provided benefits in terms of both price and innovation for all consumers. Outcomes in the market for wireless services display the signs of a competitive market, making the need for new regulations questionable.

Introduction

In its Petition, Skype requests the “Commission declare that

Carterfone applies fully to wireless networks, to initiate a rulemaking to evaluate wireless carrier practices in light of *Carterfone* and to enforce *Carterfone*, and to create an industry led mechanism to ensure the openness of wireless networks.”¹ We believe that these measures are unwarranted, and would be an unnecessary expansion of regulatory oversight of a market that the Federal Communications Commission describes as “effectively competitive.” The premises underlying the original *Carterphone* decision are inapplicable in this instance, and in fact, would entail mandates far broader than in the original decision.

Most fundamentally, *Carterfone* was a response to innovation in a regulated monopoly. In such a framework, there is no guarantee that the monopoly provider will innovate or reduce prices to maximize consumer welfare. In the absence of competition, regulatory authorities were required to make such determinations. History has shown that competitive markets have been more effective at improving consumer welfare, and we believe that activity in the wireless market demonstrates the competitive nature of the industry and subsequent benefits to consumers. The current levels of competition, as well as the potential costs of new regulatory mandates, suggest that the costs of new regulations may exceed the benefits.

Ultimately, *Carterfone* played an important role spurring innovation and competition, generating a series of decisions and actions by the Commission that led to a more competitive market. However, an examination of the wireless market suggests that additional interventions are unwarranted. Competition and customer choice have done much to discipline the market, reducing the need for additional regulations.

Further, the Skype Petition proposes more than a simple physical attachment to the network. The proposal would require a more intrusive approach, mandating new standards and open access to networks that have evolved in the competitive marketplace. This would entail a significant retrenchment of regulatory oversight, replacing an effectively competitive market with a new regulatory regime that ultimately would entail new rules for access and pricing, all in the name of achieving what already exists—a competitive outcome.

The Wireless Market

The wireless market is fastest growing segment of the telecommunications sector, with wireless voice subscribers surpassing the wireline voice service. The number of subscribers has increased

¹ Skype Communications S.A.R.L., Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks, February 20, 2007, p 2.

substantially, as has penetration of the population by wireless providers. Overall, the number of subscribers increased from 128.5 million in 2001 to 213 million in 2005. At the same time, the percentage of the population served by more than one wireless provider has increased. In 2005, 98 percent of the population had access to three or more providers, and 94 percent of the population had access to four or more providers. Four national providers and numerous regional providers offer service.²

At the same time, quality has improved dramatically as well, a fact that is borne out in customer satisfaction research. Most importantly, technological advances have improved problems with dropped and disconnected calls, which accounts for much of the increase in customer approval.³

Despite these notable improvements and the degree of competition among providers, some advocate increased levels of regulation, in essence, calling for open access to the networks of the wireless providers, as noted in the Skype petition. Yet activity in the marketplace suggests that competition does exist, something that even such advocates recognize.

Others have raised concerns about locking phones and restricting the applications that can be used on a given handset. However, there are number of potential efficiencies from such behavior, from reducing the cost of a mobile phone to efforts to improve privacy and security while reducing the possibilities for theft. Before assuming such practices are harmful and reduce consumer welfare, it is important to examine all of the costs and benefits associated with such behavior. Competition between providers reduces the possibility to extract consumer surplus by exercising market power. This competition is dynamic, and many of the practices identified as harmful are already being challenged in the competitive marketplace. Unlocked phones, for example, are available in the market, and some providers are offering to unlock phones after a given number of months of service.

In another case, Professor Tim Wu discusses efforts to limit the scope of web access available on a cell phone. He points to the Wireless Application Protocol (WAP) as an example of efforts by network providers to provide only a “walled garden” of WAP compatible web sites. Yet, after describing the problem he notes that WAP was a “commercial failure” that the carriers were

² *Eleventh Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Federal Communications Commission, September 26, 2006). See Tables 2, 4, and 11.

³ *Ibid.*, p. 78.

forced to abandon.⁴ This is an indication of a competitive and dynamic marketplace that does not require additional regulatory oversight.

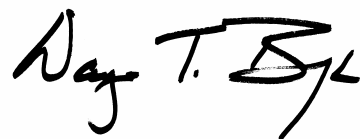
Conclusion

The cell phone market is competitive by a number of measures and calls for new “wireless net neutrality” rules are premature, at best. The Skype Petition would require more than a simple attachment to the network. As acknowledged in the petition, a regime of open access would require new technical standards and a larger role of oversight of the existing networks. The regulatory burden imposed by these mandates may, in fact, pose a greater threat to consumer welfare than does the existing marketplace—a market characterized by increasing output and falling prices.

As in other instances where concerns over monopoly exist, a more effective approach to eliminating market power is to promote competition by removing barriers to entry. For the wireless market, spectrum availability can be a concern. Increasing the amount of spectrum is a significant step that can be taken to promote competition and increase entry into this already competitive market.

We urge the Commission not to adopt new rules that may, in fact, diminish the competition and innovation that currently occurs in the wireless market. The *Carterfone* decision from the 1960s is of limited use when addressing the competitive wireless markets of 2007. With output expanding and prices declining, there is little evidence of harmful market power. Even if problems did arise, new rules are unnecessary, as the Commission already has sufficient authority to address market conduct. Finally, any concerns about a lack of competition could be addressed by expanding the amount of spectrum available to the market.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Way T. Brough". The signature is stylized with a large, looped 'W' and a cursive 'B'.

Wayne T. Brough
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FreedomWorks

⁴ Tim Wu, “Wireless Net Neutrality: Cellular *Carterfone* on Mobile Networks,” Working Paper #17 ver. 2.1, New America Foundation, February 2007, p. 15.

